

McDonald #4 Briefs

VOLUNTARY LABOR ARBITRATION

Employer

and

Union

Before the Arbitrator
Patrick A. McDonald
Hearing Date: 03-05-08

Terry Sunflower, Taylor Daisy & John Forsythia / Discharge

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Employer's Postal
Hearing Brief

ISSUE BEFORE THE ARBITRATOR

The parties did not stipulate to a specific issue in these cases; however, the City would frame the issues before the Arbitrator as:

Did the Employer violate Article 4-Management Rights; and/or, Article 10-Discharge and Discipline when the Employer discharged the three (3) named grievants effective August 28, 2007? If so, what should the proper remedy be?

FACTS IN THE CASE

Internal Affairs Complaint

In August 2007 the Internal Affairs Unit of the Employer Police Department received a complaint alleging there were sexual relations going on involving an Emergency Communications Operator (Ms. Eileen Buttercup) and other department employees while on duty and/or on Employer property. An investigation was initiated by the Internal Affairs Unit that entailed interviews with sixteen (16) individuals including Ms. Eileen Buttercup. In addition to being an employee of the Employer, Ms. Buttercup was the wife of a Employer police officer, Barry Buttercup²,

Internal Affairs Investigation – Eileen Buttercup

Ms. Buttercup was interviewed by Sergeant Brian Daffodil and Police Lieutenant Phillip Mulberry in the presence of her Union representative, Derek Viburnum, on Tuesday, August 21, 2007 beginning just before noon. In that interview Ms. Buttercup named Taylor Daisy and Terry Sunflower as two (2) of the

1 See the direct testimony of Police Sergeant Brian Daffodil.

2 See C. #12 @ pp. 14-15.

officers she had sexual intercourse with while the officers were on duty and in uniform. When expressly asked by Sergeant Daffodil if she had sex with Police Officer John Forsythia, Ms. Buttercup stated, "No."⁵

In order to carry out a complete investigation of the allegations contained in the complaint, the department interviewed any individual who was specifically named in the complaint, any individual identified by Ms. Buttercup during her interview, and any individual rumored to have been involved in sexual relations with Ms. Buttercup while she or that individual was on duty and/or on Employer property⁶. This resulted in interviews with all three (3) grievants in this case.

Internal Affairs Investigation – Terry Sunflower

On August 21, 2007 at approximately 5:00 PM, Terry Sunflower was interviewed by Police Sergeant Brian Daffodil and Police Lieutenant Phillip Mulberry in the presence of his Union representative, Officer Dan Lily. Terry Sunflower admitted that the allegations that he had sexual relations with Ms. Buttercup while on duty and/or on Employer property were true⁸. Officer Sunflower went on to describe that Ms. Buttercup on the first occasion performed oral sex on him in the women's bathroom on the third floor in the Employer Police Department headquarters building while he was on break (10-7) during his shift⁹. This occurred after what Officer Sunflower described as "Kissing, groping, grabbing" before moving into one of the women's restroom stalls. At the time of his interview Officer Sunflower indicated there could have been as many as four (4) or five (5) additional occasions while he was on duty and/or on Employer property where he and Ms. Buttercup prearranged through CAD (Computer Assisted Dispatch) to meet in headquarters and have sexual intercourse. At the hearing Terry Sunflower testified that there were only three (3) additional occasions where he and Ms. Buttercup prearranged to meet in police headquarters and had sexual intercourse in the bathrooms on the third and fourth floor¹⁵.

interview with Eileen Buttercup -

3 See transcript of the investigatory

4 ibid. @ pp. 5-8.

5ibid. 0 pp. 8-9.

6 See the direct testimony of Police Sergeant Brian Daffodil.

7 See the transcript of the investigatory interview with Terry Sunflower - J. 413.

8 ibid. 0 p. 2.

9 Ibid. 0 p. 4.

10 See direct testimony of Terry Sunflower.

Internal Affairs Investigation — Taylor Daisy

Another interview was held the evening of August 21, 2007 with Taylor Daisy beginning at approximately 5:30 PM". This interview was also conducted by Police Sergeant Brian Daffodil and Police Lieutenant Phillip Mulberry in the presence of Officer Daisy's Union representative, Officer Dan Lily. Officer Daisy admitted that the allegations he had sexual relations with Ms. Eileen Buttercup while on duty and/or on Employer property were true¹². He went on to state that he and Ms. Buttercup used MDT (Mobile Digital Terminal) messages to prearrange meetings in locations such as at Kent Skills and a Employer park at Street One and Street Two to meet while he was on duty and in uniform. Officer Daisy admitted that on one occasion Ms. Buttercup performed oral sex on him and on two (2) other occasions Ms. Buttercup and he had sexual intercourse outside the police cruiser¹³. At hearing Mr. Daisy was asked if he had removed his gun belt and lowered or removed his trousers to engage in sexual activities with Ms. Buttercup on the occasions he had admitted to. He indicated he had done so. These prearranged meetings occurred between one and three o'clock in the morning.

Affairs Investigation — John Forsythia

The last interview with the named grievants in this case, John Forsythia, occurred on Wednesday, August 22, 2007 at approximately 11:00AM. Police Sergeant Brian Daffodil conducted the interview along with Police Lieutenant Phillip Mulberry in the presence of Officer Forsythia's Union representative, Officer Greg Hillary¹⁵. Contrary to what Ms. Eileen Buttercup had stated during her interview¹⁶, Officer Forsythia openly admitted the allegations that he had engaged in sexual relations with Ms. Buttercup while he was on duty and/or on Employer property were true¹⁷. Officer Forsythia described one occasion where Ms. Buttercup performed oral sex on him in the bathroom off the break room on the fourth floor of the Employer Police Department headquarters building". On that occasion neither he nor Ms. Buttercup was on duty.

¹¹ See the transcript of the investigatory interview with Taylor Daisy - J. #14.

12 ibid. @ pp. 2 - 3.

13 ibid. @ pp. 4-5.

14 ibid. @ p. 5.

15 See the transcript of the investigatory interview with John Forsythia - J. #15.

16 See C. #12 @ pp. 8-9.

17 J. 415 @ pp. 2 - 3.

Officer Forsythia admitted that on a second occasion while he was on duty he and Ms. Buttercup made arrangements using CAD (Computer Assisted Dispatch) to meet in a private parking lot near Godfrey and Chestnut and had sexual intercourse outside the police cruiser in the early morning¹⁹.

Ms. Buttercup's Resignation

Ms. Eileen Buttercup resigned her position as an Emergency Communications Operator effective August 23, 2007²⁰. In light of that resignation, the department was unable to take further statements from her to clear up her denial on August 21, 2007 that she had engaged in sexual relations with Officer John Forsythia²¹. Her case was subsequently closed administratively by the Internal Affairs Unit²².

Other Resignations and Disciplinary Action Taken

In addition to Ms. Buttercup's resignation another Emergency Communication Operator implicated by Ms. Buttercup²³ as having engaged in sexual relations with her in the Employer Police Department headquarters building resigned his position effective August 27, 2007²⁴. That case, was also administratively closed by the Internal Affairs unit. Officer Philip Anderson and Officer David Wisteria resigned on September 4, 2007 and October 3, 2007 respectively²⁵. Finally the Employer issued a seven (7) twelve hour day suspension to Police Officer Adam Ickes²⁶. In that case there was no finding that Officer Ipomoea had engaged in sexual intercourse or had oral sex performed on him while on duty or on Employer property. However, the Internal Affairs unit did conclude that encounters had taken place with Ms. Buttercup on Employer property involving open mouth kissing and that Officer Ipomoea had made false statements during his investigatory interview.

18 ibid. @ pp. 4-5.

19 ibid. @ p. 5.

20 See C. #16 @ p. 2.

21 See the direct testimony of Police Sergeant Brian Daffodil.

22 C. #16 @ p. 1.

23 See C. #12 @ pp. 3-4.

24 See C. #17 @ p. 2.

25 See C. #18 and C. #19.

Other Cases Determined to Be Unfounded

The other cases investigated by the Internal Affairs unit were determined to be unfounded²⁶. Those cases were closed accordingly. Police Chief Henry Dogwood then changed the status of the three (3) grievants from administrative leave with pay to suspension pending termination by letters dated August 27, 2007²⁷.

Discharge Hearings and Deliberation by the Employer Manager

Disposition reports and action reports were issued for Officer Sunflower, Officer Daisy, and Officer Forsythia recommending termination from employment for engaging in indecent conduct while on duty and/or on Employer property, unbecoming conduct, and/or conducting personal business while on duty²⁸. The disposition reports were signed in acknowledgment of the recommendations by Employer Manager Kaden Juniper on September 13, 2007.

Under Employer Employer Charter provisions³⁰, each employee was afforded due process rights to be heard prior to the final decision being made by the Employer Manager to carry out the recommended discharge of Officer Sunflower, Officer Daisy, and Officer Forsythia. Each officer took advantage of those Loudermill³¹ rights to present additional evidence and/or to be heard directly in his own defense prior to the final decision being made by Mr. Juniper. Those hearings took place on Thursday and Friday, September 27th and 28th, 2007. After consideration of all the evidence presented to him, consultation with various professionals for their perspective, and his personal deliberation³², Mr. Juniper made his decision to discharge the officers. Each employee received notice of that determination by letter dated October 2, 2007³³.

Grievances Filed by the Union

The discharges had been previously challenged in the suspension stage by the Employer

26 See J. #20 @ p. 3.

27 See the direct testimony of Police Sergeant Brian Daffodil.

28 See J. #7 (A, B & C).

29 See J. #8 (A, B & C).

30 See J. #9 (A, B & C).

31 Cleveland Board of Education v. Loudermill, U.S. Supreme Court, 1 TER Cases 424, March 19. 1985.

32 See C. #21 and direct testimony of Kaden Juniper.

Police Officers Association (UNION)³⁴; however, through an agreement between the Union and the Labor Relations office³⁵, the grievances were accepted in advance as protesting the discharges as carried out on October 2, 2007. The issues are now properly before the Arbitrator for his Opinion and Award. There are no threshold issues present in these cases to challenge their arbitrability.

THE EMPLOYER'S ARGUMENTS IN CASE UNION 3-07

Terry Sunflower has admitted to engaging in sexual activities with a department employee who is the wife of a fellow officer while he was on duty and/or on Employer property on four (4) separate occasions. One (1) occasion involved having oral sex performed on him by Ms. Buttercup. The other three (3) occasions involved sexual intercourse with Ms. Buttercup. All of the acts occurred in the Employer Police Department headquarters building after being arranged through use of Computer Assisted Dispatch (CAD).

We ask the Arbitrator to conclude that Terry Sunflower failed to maintain exemplary military bearing while on duty or in uniform in violation of Manual Conduct provisions 9.4³⁶; devoted duty time to an activity not related to his police function and conducted personal business while on duty and/or on Employer property in violation of Manual of Conduct provisions 13.3³⁷; engaged in unbecoming conduct which brought the Employer Police Department into disrepute, reflected unfavorably on him as a member of the department, damaged his reputation, and impaired the operation and efficiency of the department in violation of Manual of Conduct provisions 18.1³⁵; and, engaged in indecent conduct in violation of Employer Rules and Regulations, Section 2, Rule 9³³. The Employer argues that Terry Sunflower's actions meet the dictionary definition of *indecent* (*grossly unseemly or offensive to manners or morals*) conduct and discharge is warranted for that infraction alone.

Finding such violations we ask the Arbitrator to sustain the discharge of former Police Officer

33See J. #10 (A, B & C).

343. 3. #3 & 3. #4.

35 #2

36See J. # 6 @ p. 5(2.1-5).

37i b i d , @ p. 7(2.1-7).

38ibid, @ p. 9(2.1-9).

39ibid, @ p. 16(2.2-2) as incorporated into the Manual of Conduct.

Terry Sunflower.

THE EMPLOYER'S ARGUMENTS IN CASE UNION 4-07

Taylor Daisy has admitted to engaging in sexual activities with a department employee who is the wife of a fellow officer while on duty and/or on Employer property on three (3) separate occasions. One (1) occasion involved having oral sex performed on him by Ms. Buttercup outside a police cruiser near Street One and Street Two within the Employer of Employer. The other two (2) occasions involved sexual intercourse with Ms. Buttercup. Those acts occurred within the boundaries of the Employer of Employer outside a police cruiser after being arranged through use of a Mobil Digital Terminal (MDT) to arrange meetings with Ms. Buttercup.

We ask the Arbitrator to conclude that Taylor Daisy failed to maintain exemplary military bearing while on duty or in uniform in violation of Manual Conduct provisions 9.4"; devoted duty time to an activity not related to his police function and conducted personal business while on duty and/or on Employer property in violation of Manual of Conduct provisions 13.3⁴¹; engaged in unbecoming conduct which brought the Employer Police Department into disrepute, reflected unfavorably on him as a member of the department, damaged his reputation, and impaired the operation and efficiency of the department in violation of Manual of Conduct provisions 18.1⁴²; and, engaged in indecent conduct in violation of Employer Rules and Regulations, Section 2, Rule 9⁴³ ⁴⁴. The Employer argues that Taylor Daisy's actions meet the dictionary definition of **indecent** (*grossly unseemly or offensive to manners or morals*) conduct and discharge is warranted for that infraction alone.

Finding such violations we ask the Arbitrator to sustain the discharge of former Police Officer Taylor Daisy.

40 See J. #6 @ p. 5(2.1-5).

41 ibid, @ p. 7(2.1-7).

42 ibid, @ p. 9(2.1-9).

43 *ibid*, @ p. 16(2.2-2) as incorporated into the Manual of Conduct.
44 *ibid*, @ p. 16(2.2-2) as incorporated into the Manual of Conduct.

THE EMPLOYER'S ARGUMENTS IN CASE UNION 6-07

John Forsythia has admitted to engaging in sexual activities with a department employee who is the wife of a fellow officer while on duty and/or on Employer property on two (2) separate occasions. One (1) occasion involved having oral sex performed on him by Ms. Buttercup in the Employer Police Department headquarters building. The other occasion involved sexual intercourse with Ms. Buttercup outside a police cruiser near Godfrey and Chestnut within the boundaries of the Employer of Employer. All of the acts occurred after being arranged through use of Computer Assisted Dispatch (CAD).

We ask the Arbitrator to conclude that John Forsythia failed to maintain exemplary military bearing while on duty or in uniform in violation of Manual Conduct provisions 9.4⁴⁵; devoted duty time to an activity not related to his police function and conducted personal business while on duty and/or on Employer property in violation of Manual of Conduct provisions 13.3⁴⁶; engaged in unbecoming conduct which brought the Employer Police Department into disrepute, reflected unfavorably on him as a member of the department, damaged his reputation, and impaired the operation and efficiency of the department in violation of Manual of Conduct provisions 18.1⁴⁷; and, engaged in indecent conduct in violation of Employer Rules and Regulations, Section 2, Rule 9⁴⁸⁴⁹. The Employer argues that John Forsythia's actions meet the dictionary definition of *indecent* (*grossly unseemly or offensive to manners or morals*) conduct and discharge is warranted for that infraction alone.

Finding such violations we ask the Arbitrator to sustain the discharge of former Police Officer John Forsythia.

REBUTTAL OF THE UNION'S ARGUMENTS

At hearing the Union presented a number of prior cases⁵⁰ to the Employer Manager during his cross

⁴⁵ See J. #6 ap. 5(2.1-5).

⁴⁶ *ibid*, ap. 7(2.1-7).

⁴⁷ *ibid*, ap. 9(2.1-9).

⁴⁸ *ibid*, p. 16(2.2-2) as incorporated into the Manual of Conduct.

49 *ibid*, c p. 16(2.2-2) as incorporated into the Manual of Conduct.

50 See U. #22 (CR07-0038), U. #23 (CR07-0038); U. #24 (CR02-046); and, U. #25

examination making a claim, for the first time, that there has been disparate treatment of the former officers in this case. None of those cases involved multiple cases of pre-arranged meetings with a female employee of the Employer Police Department where sexual activities took place. None of those cases involved a cited violation of Employer Rules and Regulations, Section 2, Rule 9 where a finding of indecent conduct was sustained. The only case where sexual intercourse took place was with a female employee of Paradise Tan in CR92-23251.

The facts in that case show Police Officer Rupert Spruce had been assigned to a special federal and county task force on an undercover basis to investigate activities where it was anticipated he would be exposed to such activities. He was directed by the Employer Police Chief and task force supervisor not to engage in those activities when they presented themselves. Those circumstances clearly are not present in the cases before this Arbitrator.

The record is further void of any evidence that the Union considered Officer Spruce as engaging in indecent conduct in 1992 while on undercover assignment. Also, the Union did not challenge at the time the twenty (20) day suspension was imposed upon Rupert Spruce the Internal Affairs findings that he failed to obey the order of a supervisor (in violation of Manual of Conduct provisions 5.1⁵²) and engaged in unbecoming conduct (in violation of Manual of Conduct provisions 18.1⁵³). Case CR92-232 speaks for itself and establishes facts far different from the current cases.

We ask the Arbitrator to find that the cases presented by the Union at hearing do not establish the fact that former Officers Sunflower, Daisy, and/or Forsythia have been discharged without proper cause due to disparate treatment, and that the penalties in these cases are appropriate based upon the proven infractions.

(CR92-232).

⁵¹ U. #25.

⁵² See J. #6 @ p. 3(2-1.3]).

⁵³ ibid. @ p. 9(2-1.9]).

CLOSING

It is indeed unfortunate that the three (3) former Employer Police Officers engaged in sexual activities with a fellow officer's wife and department employee while on duty and/or on Employer property on multiple pre-arranged occasions. The facts show that each openly admitted to the activities, were otherwise exemplary officers with clean service records, and were sincerely remorseful for their actions. However, these facts should not outweigh the gravity of the proven offenses. Under the provisions of Article 8-Grievance Procedure, Section 4(Step 2, C)⁵⁴, the discharges should only be disturbed if the retained right of the Employer to issue discipline for "proper cause" lacks rationality and fairness⁵⁵. These former Police Officers after all were grown men who failed to live up to their solemn signed oaths of office⁵⁵.

We ask the Arbitrator to sustain the discharges of Terry Sunflower, Taylor Daisy, and John Forsythia and to conclude that the Employer had proper cause for the disciplinary action taken based upon the proven offenses and cited rules infractions.

Respectfully submitted,

⁵⁴ See J. #1 @ pp. 5-6.

⁵⁵ Also see Ohio State Patrol and Fraternal Order of Police, 94 LA 58 @ pp. 59-

61, Arbitrator Patricia Beal, January 15, 1990.
56 See C. #11 (A, B & C).

VOLUNTARY LABOR ARBITRATION

In the Matter of the Arbitration
Between:

Employer

Arbitrator: Patrick A. McDonald

-and-

Union.

Gr: T. Sunflower, T. Daisy, J. Forsythia/Discharge

UNION'S POST-HEARING BRIEF

BACKGROUND:

Even though these grievances were consolidated for hearing, the Union requests that the Arbitrator consider the unique merits of each grievance individually when rendering his award.

The stipulated facts regarding the misconduct of the Grievants are contained in the following exhibits: Terry Sunflower (Jt. Ex. 13), Taylor Daisy (Jt. Ex. 14), John Forsythia (Jt. Ex. 15). The Union stipulated to the facts contained within these exhibits with the following clarification: After reflection, Terry Sunflower believes that he had only four incidents of sexual contact with Eileen Buttercup rather than the five to six he specified in Joint Exhibit 13. It was also agreed that the various other exhibits could also be utilized to provide a factual background to the extent that they do not contradict the previously cited exhibits.

Briefly stated, the background leading up to arbitration was as follows:

As the result of a complaint made to internal affairs, Eileen Buttercup, an emergency communications officer, was interviewed by internal affairs regarding having sexual relations with Employer police officers while they were on duty. (Employer Ex. 12). During this interview, Ms. Buttercup implicated five police department employees, including police officers Sunflower and Daisy. *Id.* She specifically denied sexual contact with officer Forsythia. *Id.*

As a continuation of the investigation, officers Sunflower (Jt. Ex. 13), Daisy (Jt. Ex. 14), and Forsythia (R. Ex. 15) were interviewed by internal affairs. During their interviews, all three officers were forthcoming and honestly answered all questions to the best of their ability. In fact, without their honesty, there would be only hearsay evidence against Sunflower and Daisy and no evidence against Forsythia. Sunflower relayed that he believed he had sexual relations with Buttercup while he was on duty between four and six times. Daisy admitted to three occasions of sexual relations with Ms. Buttercup while he was on duty. Forsythia admitted to having sexual relations with Ms. Buttercup on one occasion while he was on duty. Forsythia also admitted to sexual relations with Ms. Buttercup on one other occasion while on Employer property when they were both off duty. Until this investigation, each of these three officers was unaware of any other officer's involvement with Ms. Buttercup.

During the investigation, other officers were interviewed, including police officer Adrian Ipomoea. (Jt. Ex. 20). Ultimately, Ms. Buttercup was determined to have had sexual relations with six Employer Police Department employees while they were on duty. Prior to any determination of discipline, someone with knowledge of the investigation leaked information to the media. This led to the media obtaining information about the facts of the investigation and to the Employer Manager's "Media Release" regarding the disposition of the investigation. (Employer Ex. 21).

As a result of the investigation, Ms. Buttercup and three of the men involved chose to resign their employment. {Employer Ex's. 16, 17, 18, & 19). Chief Dogwood, who had accepted a new position in North Carolina, suspended Sunflower, Daisy, and Forsythia "without pay pending termination" on August 27, 2007. (Jt. Ex. 7). The suspensions "without pay pending termination" became widely publicized due to the involvement of the media in this matter. Complaint dispositions recommending termination of Sunflower, Daisy, and Forsythia were prepared (Jt. Ex. 8), and on October 2, 2007, the Employer Manager, Kaden Juniper, terminated the employment of Sunflower, Daisy, and Forsythia. (Jt. Ex. 10).

At the time Sunflower, Daisy, and Forsythia were "suspended without pay pending termination", the Union filed grievances. (Jt. Ex's. 2, 3, & 4). It was agreed between the Employer and Union to put the grievances on hold until a final determination was made. (Jt. Ex. 5). Once the Employer Manager's final determination was made, arrangements were made to schedule arbitration. It was agreed to consolidate the three grievances into one hearing. This matter was arbitrated on March 5, 2008.

ARGUMENT:

This is an unfortunate case in which each of the Grievants fell victim to the enticements of Ms. Buttercup. It appears obvious that Ms. Buttercup was skilled at enticing men since she became sexually involved with at least six Employer Police Department employees. By some definitions, Ms. Buttercup's track record would earn her the label of "sexual predator". The Union and Grievants recognize that this does not negate the fact that the Grievants are responsible for their actions and deserve some discipline for their misconduct. However, based on all the factors involved in this case, it is clear that the Employer overreacted when it made the decision to terminate

the employment of these competent and experienced officers with otherwise outstanding work records.

It is the position of the Union that the discharge from employment of the Grievants was without just cause. This discipline was neither progressive nor corrective in nature, and, when compared with other disciplinary actions for similar conduct and rule violations, results in disparate treatment of the Grievants.

The Charges:

Both the Union and the Grievants acknowledge that there was misconduct and that some discipline is appropriate. Further, the Union and Grievants acknowledge that there was a violation of certain rules. However, two of the cited rules require further evaluation.

The Grievants were found to have violated Employer Police Department Manual of Conduct, Section 18.1 (Unbecoming Conduct). (.1t. Ex's. 8 & 6). To the extent violation of any part of this rule is based on their misconduct becoming public knowledge, the Union believes application of this rule is grossly unfair. The Grievants did nothing to cause their misconduct to become public knowledge and there was nothing inherent in their misconduct which caused it to become public knowledge. Somehow, the investigation into this matter was leaked to the media. While the employer denies leaking this information to the media, there is certainly the possibility that someone within the Employer administration may have leaked the information. If the Employer is allowed to bolster charges when otherwise private information is leaked to the press, it will potentially provide an incentive for certain Employer employees to leak information regarding misconduct investigations.

The Grievants were also found to have violated the Employer Rules and Regulations, Section 2, Rule # 9 (Engaging in indecent conduct). (Jt. Ex's. 8 & 6). It is within the City's contractual right to promulgate and enforce reasonable rules. However, when a rule fails to give fair notice as to what conduct is prohibited, the rule is unreasonable on its face. "Indecent conduct" is subject to many possible interpretations. Any thesaurus will list synonyms of "indecent" such as offensive, improper, filthy, impolite, and shocking. Like offensive, filthy, impolite, shocking, or improper conduct, the interpretation of "indecent conduct" is in the eye of the beholder. The definition of "indecent conduct" is obviously very dependent on one's belief system and moral code, Within certain belief systems, drawing a picture of Mohamed would be considered "indecent conduct". In other belief systems, eating pork would be considered "indecent conduct". Clearly a rule which fails to clearly define what conduct is prohibited is vague and unreasonable. This rule is just such a rule. It is similar to a rule which prohibits "offensive or improper conduct". One is left to guess what might be considered indecent or offensive and by what standard. The rule simply fails to define with any particularity what conduct is prohibited. Therefore, to the extent this rule may have any impact on the level of discipline considered appropriate, the Union urges the arbitrator to find this rule to be unreasonable and unenforceable on its face.

The Discipline Imposed Was Not Progressive or Corrective:

It is commonly accepted that the purpose of discipline under the just cause standard is to encourage and allow an employee to correct errant conduct. Under this concept, employees should not be discharged unless progressively more severe discipline has failed over time to cause the employee to meet the expected standards. The employer as well as the employee gain

by maintaining the employment relationship. This is particularly true with competent and experienced employees. It is expensive to hire and train new employees, and there is no guarantee that the new employees will have similar capabilities or better conduct.

All three Grievants are experienced officers with good work records. Daisy had approximately six and one half years of experience, Forsythia had approximately eleven years of experience, and Sunflower had approximately twelve years of experience. None of the Grievants has a prior disciplinary record. All of the Grievants enjoyed being police officers and believe they have the ability to continue be good police officers and employees. All the Grievants are remorseful and self corrected their misconduct long before the investigation even started. Finally, all the Grievants were cooperative and honest during the investigation. Without their honesty and cooperation, it is unlikely that the employer would have had a factual basis upon which to issue discipline.

Taking all the above factors into consideration, it is clear that the corrective and progressive concept of just cause was not applied. Rather, the employer unreasonably utilized the ultimate disciplinary penalty for a first offense even though it was reasonably obvious that each Grievant had learned from his mistakes and had self corrected his own misconduct. Clearly it is unreasonable to use a sledge hammer when a slight adjustment with a screwdriver will do the job.

Disparate Treatment:

Just cause as well as basic fairness requires that employees who engage in similar misconduct and violate similar rules receive similar discipline. Obviously, it is rare to find cases that are absolutely identical. Thus, just cause allows some disparity in treatment for similar rule

violations. However, when the disparity is extreme, even if the facts are not identical, the disparity in treatment becomes so obviously unreasonable so as to violate just cause.

There are four cases in evidence which demonstrate that the Employer has disparately treated the Grievants. (U. Ex's. 22, 24, & 25; R. Ex. 20). Each of these cases will be discussed below.

Joint exhibit 20 relates to the discipline of police officer Adrian Ipomoea. This discipline arose out of the same investigation as the instant matter. Ipomoea was interviewed by internal affairs during the investigation relating to Ms. Buttercup. Ipomoea admitted to intimate physical contact with Ms. Buttercup on eight to ten occasions while on duty. (R. Ex. 20). However, he denied that this intimate physical contact included sexual relations. *Id.* He was also found to have given false information during his internal affairs interview and to have falsified his logs while spending time with Buttercup. *Id.* Additionally, he used the CAD messaging system to send inappropriate messages. *Id.* Similar to the Grievants, Ipomoea was spending time with Ms. Buttercup rather than attending to his duties. He was found to have violated some of the same rules as the Grievants. Notably, however, he was found to have violated more rules than the Grievants. (Compare it. Ex. 8 with Jt. Ex. 20). For his misconduct, Ipomoea received only a seven day suspension. (Jt. Ex. 20).

As is evident in Union exhibit 25, while on duty and working undercover, police officer Rupert Spruce paid \$60.00 to a prostitute and engaged in sexual intercourse with her. In doing so, he disobeyed a direct order of the Chief of Police. *Id.* For this misconduct, he received the equivalent of a one month suspension. *Id.* Similar to the Grievants' misconduct, Spruce's misconduct involved sexual intercourse while on duty. While it was not identical, one can certainly argue it was more serious misconduct. Spruce not only engaged in sexual intercourse

while on duty, he engaged in clearly illegal sexual activity. To make matters worse, he did this in direct contravention of the Chief's order.

Union exhibit 24 describes the misconduct of Sergeant Jeff Douglas-fir. Even though sergeants are not technically supervisors in the Employer Police Department, they are team leaders and, as such, are expected to set an example. Without permission, Douglas-fir left his duty assignment, changed into civilian clothing, and went to a bar to play in a band. *Id.* He was out of uniform and unable to respond to emergencies or other duty related tasks for approximately forty-five minutes. *Id.* He did not notify dispatch that he would be unavailable and falsified his log. *Id.* For this misconduct, Douglas-fir received the equivalent of a one week suspension. *Id.* Similar to the misconduct of the Grievants, Douglas-fir's misconduct involved conducting personal business while on duty and being out of uniform. One can argue that his misconduct was more serious since he was a team leader, was completely out of uniform, would have been unable to hear emergency radio broadcasts, and he falsified his log. In fact, he was found to have violated more rules than were the Grievants. (Compare Jt. Ex. 8 and U. Ex. 24).

Union exhibit 22 describes the misconduct of Lt. William Willow. At the time of this misconduct, Willow was not only a command officer, he was the commanding officer in charge of the internal affairs office. *Id.* Obviously, his position was one which should set an example. Willow essentially utilized on duty time to engage in a romantic affair with Kate Violet. *Id.* This affair included on duty physical contact, and included utilizing on duty time to maintain the relationship by talking on the phone, sending emails, and meeting in stairwells. (U. Ex. 22 & 23). For this misconduct, Willow received the equivalent of a one week suspension. (U. Ex. 22). Similar to the misconduct of the Grievants, Willow's misconduct involved engaging in a romantic relationship while on duty. This relationship clearly involved physical contact while on duty.

One can only speculate what took place in the stairwells. One can argue that his misconduct was more serious than that of the Grievants since he was a command officer in charge of internal affairs.

While none of the misconduct discussed above is identical to the misconduct of the Grievants, there are enough substantial similarities to demonstrate a gross disparity between the disciplinary actions taken against the above mentioned individuals when compared to the action taken against the Grievants. The above cases demonstrate that other individuals have engaged in conduct which involved sexual and romantic acts on duty, the use of business time to conduct personal business, and conduct which some would surely label as indecent without suffering discipline anywhere close to the discipline received by the Grievants.

The only explanation the City appears to offer for this disparity in treatment is that the Grievants engaged in multiple acts of misconduct. This explanation, however, appears, to be disingenuous. Adrian Ipomoea and Lt. Willow also engaged in multiple acts of misconduct and were not discharged from employment. Additionally, the Grievant Forsythia had only one on duty sexual encounter with Buttercup, but he was treated the same as Sunflower and Daisy. (it. Ex's. 8c & 15). The City obviously painted with a broad brush when dealing with these Grievants. The real explanation for the disparity in treatment appears to be the media coverage this investigation received. During cross examination of the City Manager, it was apparent that the media coverage of this matter played a large part in his decision to terminate the Grievants' employment. This conclusion is supported by his need to release a media statement relating to his decision. (City Ex, 21).

Through no fault of the Grievants, the media obtained information about this investigation. Since sex was involved, today's tabloid-like media had a field day with the story.

This in turn appears to have resulted in a "perfect storm" which caused the City to overreact. Chief Dogwood had accepted a new position in North Carolina. He was certainly aware that his future employer would be watching how he handled this situation. Wanting to appear tough and in control, he suspended the Grievants without pay with a recommendation for termination. The press and media were almost immediately made aware of the action taken by Chief Dogwood. The final decision was now left up to the City Manager. He too obviously knew the media would be watching. If he did not support the Chief's recommendation, it would appear that he did not support his department heads and that he was tolerant of misconduct. His "Media Release" speaks for itself. (City Ex. 21).

Doing what is politically and personally expedient is not an element of just cause. The media's involvement in this case does not justify the gross disparity between the discipline the Grievants received and the discipline the individuals discussed above received. Considering all the factors involved in this case, including how cases with substantially similar misconduct have been handled, termination of employment was clearly unreasonable discipline. Based on the previously discussed cases, it appears that a suspension anywhere in duration from one week to one month would have been reasonable and supported by just cause. Even so, the Grievants and the Union would have been and are willing to accept virtually any discipline short of termination.

RELIEF REQUESTED:

The Union requests that the Arbitrator grant the grievance, ordering the City to return the Grievants to work, and, taking into account all applicable factors of each individual case and just cause, to reduce the discipline to a suspension for each Grievant with any appropriate back pay and benefits.

Respectfully submitted,
Attorney for Union

Dated: April 11, 2008